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No. 77-527

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHARLES W. RAMSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court erred in imposing an enhanced sentence on the basis of a prior narcotics conviction that the government failed to set forth in an information filed before trial, as required by 21 U.S.C. 851(a)(1).

Following a jury-waived trial on stipulated facts, petitioner was convicted on three counts of unlawful use of a communication facility, in violation of 21 U.S.C. 843(b), one count of receiving and possessing a firearm as a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1), one count of receiving and possessing a pistol, in violation of D.C. Code 22-3203, one count of unlawful importation of heroin, in violation of 21 U.S.C. 952(a), and one count of possession of heroin with intent to

distribute, in violation of 21 U.S.C. 841(a). He was sentenced to imprisonment for terms of 32 months to 8 years on each of the communications charges, 8 to 24 months on the firearms count, and 12 months on the pistol offense. On the basis of a prior conviction for violating federal narcotics laws, petitioner received an enhanced sentence of 10 to 30 years' imprisonment on each of the narcotics offenses. All terms of imprisonment were to run concurrently.

A divided panel of the court of appeals reversed the convictions. 538 F. 2d 415. On June 6, 1977, this Court reversed that decision. 431 U.S. 606. On August 24, 1977, the court of appeals *sua sponte* entered an amended judgment affirming the convictions in conformity with this Court's directive. Thereafter, petitioner filed a motion for reconsideration of his argument, first raised on appeal, challenging the district court's sentencing decision. The court of appeals denied the motion (Pet. App. 1a-2a). A petition for rehearing was also denied (Pet. App. 1b-2b).

The penalty provisions of the federal narcotics laws under which petitioner was sentenced both provide that enhanced sentences of up to 30 years' imprisonment may be imposed if a defendant has previously been convicted of a federal narcotics offense. See 21 U.S.C. 841(b)(1)(A); 21 U.S.C. 960(b)(1), 962(a). The statutory provision governing the procedure by which such prior convictions may be established is 21 U.S.C. 851(a)(1). That section states:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial * * * the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

Petitioner contends that the government failed to file the required information before trial and that therefore his sentence should be reduced to the statutory maximum available for a first offender.

The record in this case reveals that trial on stipulated facts commenced on November 22, 1974. The decision to proceed on a stipulated record was prompted by the complexity of the government's case and the large number of witnesses that the government expected to call if the case were submitted by oral testimony. See Tr. of November 18, 1974, pp. 3-8, 11-12. At the beginning of trial, the prosecutor announced that he wished "to place in the file formally with the Court the Record and Index of Record in these cases, copies of which, of course, have been given to both counsel and the Court prior to this hearing" (Tr. of November 22, 1974, p. 5). See Pet. App. 1d-4d. The district court then gave its permission for the government to submit first Sections II and IV of the stipulated record, involving "evidence gathered in foreign countries by foreign officials on foreign soil about foreign nationals" (Tr. of November 22, 1974, p. 7.). The decision to allow the prosecution's evidence to be submitted "out of order" was motivated by a desire "to accommodate foreign witnesses so they [could] return to their home country" (*ibid.*). The court accepted the government's proffer of part of the stipulated record and set December 2, 1974, as the date for continuation of trial (*id.* at 9). The remainder of the record was presented to the court on that date. Included in this December 2 submission was the record's "Preamble," setting forth the terms of the pre-trial agreement between the prosecutor and defense

counsel and, in particular, notifying the court of petitioner's prior felony conviction for violating the federal narcotics laws. See Pet. App. 2d-4d.

The enhanced sentencing information was thus part of the pre-trial agreement between the government and petitioner. Petitioner does not dispute this point. As the court of appeals correctly found, notice of the prosecution's intention to seek enhanced sentencing was received by petitioner's counsel prior to trial (Pet. App. 1a-2a). The only reason that the information was not formally presented to the court at that time was that the court permitted the prosecution to introduce the stipulated record "out of order" in an attempt to accommodate foreign witnesses. Petitioner was in no way prejudiced by the procedure followed here. Indeed, since the trial was continued from November 22, 1974, to December 2, 1974, no proceedings whatever were conducted during the period between the "beginning" of trial and the government's formal submission of the enhanced sentencing information. Under these circumstances, it would exalt form over substance to find a violation of Section 851(a)(1) requiring reduction of petitioner's sentence.

United States v. *Noland*, 495 F. 2d 529 (C.A. 5), certiorari denied, 419 U.S. 966, need not be read in a contrary manner. In that case, the district court imposed an enhanced sentence despite the government's failure to file the information required by 21 U.S.C. 851(a)(1). Defendant moved for reduction of sentence to the maximum term that could be imposed on a first offender. In response, the government filed an information setting forth defendant's prior narcotics conviction. The district court then denied defendant's motion. The court of appeals affirmed defendant's conviction but remanded for

reduction of sentence in light of Section 851(a)(1). Unlike the defendant in *Noland*, petitioner here was plainly advised before trial of the prosecution's decision to seek enhanced sentencing on the basis of a particular prior conviction identified in the pre-trial agreement between counsel. That agreement was included in the part of the stipulated record submitted to the district court on the second day of trial, before petitioner's conviction and sentencing. The Preamble to the record was not submitted before trial only because the district court agreed, for reasons wholly unrelated to petitioner's sentencing, to permit presentation of the government's evidence out of order. The factual situation confronting the court of appeals in this case was thus significantly different from that faced by the Fifth Circuit in *Noland*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

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